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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 475

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Defendant and Third-Party Plaintiff-Petitioner,

against

ALBERT BANKS,
Plaintiff-Respondent,

and

NINNIE BROTHERS,
Third-Party Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Central Hudson Gas & Electric Corporation, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in the above entitled action, rendered on July 6, 1955.

Official Report of the Court Below

The opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported, but is annexed hereto.

Jurisdiction

The opinion of the court below was filed on July 6, 1955. The judgment entered thereon was entered in the office of the clerk of the court on September 7, 1955.

A petition for rehearing was denied on August 24, 1955.

Jurisdiction to review this decision is predicated upon Title 28 U. S. C. § 1254 (1).[1]

Question Presented

Whether the court below erred in applying the Law of New York to the facts in the instant case.

Basis of Jurisdiction of the United States District Court for the Southern District of New York

The jurisdiction of the United States District Court for the Southern District of New York was invoked on the ground of diversity of citizenship.[2]

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[1] Title 28 U. S. C. § 1254 (1):

§ 1254. Court of appeals; certiorari, appeal; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

[2] Plaintiff was a resident of the State of New Jersey. The petitioner is a New York Corporation and Ninnie Brothers are residents of New York State.

Statement*

The petitioner is engaged in producing and distributing electric power in several of the counties adjourning and near the Hudson River, New York State. One of its lines served the area between Beacon and Cold Spring, New York. This line supplied over one thousand customers including a hospital (1103-1106).

While there was a switch that could have been turned so as to cut off the electric current in the wires herein involved, yet had that switch been turned, there would have been no electricity for the one thousand customers served by these wires, as there was no other source of current running into Cold Spring, (102, 112-116, 1198, 1199).

About November, 1951, because a business concern in Beacon, New York, was about to construct a building on the West side of South Avenue in that City, the petitioner moved its high tension wires from the side of the street along which the building was to be constructed to the opposite side of the street. The wires as moved to their new location were about 50 to 60 feet away from the projected building. These wires were suspended on poles 40 to 50 feet above street level. The minimum distance above the ground required by the United States Department of Commerce and the minimum distance in general practice was only 20 feet. While insulation may be used on high tension wires carrying the voltage of these wires, it is not common practice in a location such as this, where no trees are present, to have such wires insulated (86-88, 105, 1097-1098, 117, 1115-27, Exhibit G, 1643, 59, 65-91, 118, 1153-55, 1157, 1160-1163).

A day or two before July 18, 1952, and unknown to the petitioner, Albert Banks, an employee of Ninnie Brothers,

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* References are either to folios or pages of the record unless otherwise indicated.

assisted in taking three or four pieces of steel from the rear of the building being constructed on the West side of South Street and putting them, with the use of a crane, on the East side of South Street and directly under the high tension wires of the petitioner (175-178, 208-209, 220, 227, 476-482).

The placement of those pieces of steel under the wires of the petitioner was done with full knowledge on the part of Ninnie and his crane operator of the presence of the high tension wires (507-508, 862, 863, 667, 668, 746, 876). As a matter of fact, at the time the pieces of steel were placed under the wires, Ninnie's crane operator told the plaintiff and other fellow workers "There's high tension wires up there" (863-66, 877-80, 897-99).

Eugene Ninnie, one of Ninnie Brothers, not only had been told by one of the petitioner's employees of the presence of the high tension wires, but he had also warned Mr. Banks and his other employees of the presence of those high tension wires while his employees were placing the pieces of steel under the wires (1394-95, 1399-1401, 1404).

On July 18, 1952 the plaintiff, working with the same fellow employees who had placed the pieces of steel under the wires, was removing those pieces of steel by use of a crane with a boom about 40 to 45 feet in height. While removing the second piece of steel the boom came into contact with the wires 40 to 45 feet above the ground and as it did, the current was transmitted to the person of Mr. Banks who was holding a metal block attached to the crane (323, 213-215, 712-14, 767). Until the morning of the accident the crane had not been used on the outside of the building on the roadway for the placement of steel (213-215).

The petitioner was not asked to remove its wires (1385, 1386).

Reasons Relied on for the Allowance of the Writ

The United States Court of Appeals erred:

(1) In failing to consider some of the important facts in the case.

(2) In improperly applying the Law of the State of New York.

(3) The decision is important throughout the nation.

POINT I

The United States Court of Appeals failed to consider important facts in reaching its decision.

The United States Court of Appeals pointed out that the wires were not de-energized. This refers to C. C. A. opinion annexed hereto (3a). This is true. The Trial Court had eliminated the de-energizing or insulation of the wires as a basis of negligence against the petitioner. The Trial Court charged "The first thing I am going to take out of it (the negligence of the respondent) is this business of de-energizing the wires" (1464-66). This was a trial by the Court and a jury and not by the Court alone.

The de-energizing or insulation of the wires should not have been a basis for the United States Court of Appeals, in part, to have predicated liability against the petitioner, because as a matter of legal principle and under the decisions in New York in similar cases, there was no obligation on the part of the petitioner to have de-energized or insulated the wires. Had the wires been de-energized, one thousand inhabitants and a hospital would have been deprived of electricity, since there was no other source of current (112-16, 1198-99).

The petitioner had removed its wires from the side of the street on which the building operations were conducted and had placed its wires twice as high as regulations and common usage required. The petitioner had no knowledge that the pieces of steel had been placed under its wires a day or two before the accident and there had never been a request by the plaintiff's employer, Ninnie Brothers, to de-energize the wires (1385-86).

The United States Court of Appeals stated:

> "Central never warned Ninnie that the wires were uninsulated and carried high voltage electric current." (4a, C. C. A. Charge, opinion.)

To the contrary, the record of the trial shows that not only did Ninnie know of the presence of the high tension wires, but further the record specifically shows that one of the petitioner's employees had warned Ninnie of the presence of the high tension wires (1394-95).

In addition to the warning by petitioner's employee to Ninnie, Ninnie admitted knowing of the presence of the high tension wires because he testified of warning his three employees (including Mr. Banks), of the danger existing and urged them to be careful of the wires (1399-1401, 1404).

Petitioner was never requested to shut off the electric current or re-set its wires (1403).

POINT II

The law applied by the United States Court of Appeals is not in conformity with the law of the State of New York.

In *Troidle* v. *Adirondack P. & L. Corp.*, 252 N. Y. 483, the defendant in that case maintained overhead high tension wires across private property. The weather-proofed wires were twenty feet above the ground and carried 2,300

volts. Plaintiff was injured when a radio aerial wire which he was attempting to install came in contact with defendant's wires, causing severe injuries. When the aerial was in position it would cross the electric wires at a right angle and at an elevation of 20 feet above the wires. In order to clear the wires the plaintiff weighted the end of the aerial wire and threw it up over the high tension wires, thus making contact and causing the injuries. Plaintiff claimed that the defendant was negligent in not so insulating its wires and so maintaining the insulation material that the dangerous current could not have escaped to the aerial wire.

The Court unanimously dismissed the complaint, holding that defendant's wires were so located that no hazard was created, in the course of an ordinary use, either for those occupying the buildings on the lot or for those pursuing occupations of pleasure or business without the buildings. With respect to insulation the Court stated at page 487:

> "We think that the defendant owed no duty to this plaintiff so to insulate its wires that, in an extraordinary and perilous situation of his own creation, in which he voluntarily placed himself, he might be immune from harm." (Citing cases.)

And at page 488:

> "• • • We think that, in the situation shown, the defendant owed to the plaintiff no duty of insulating its wires, that he might be protected against the perils of an action, deliberately performed by him, which was so extraordinary and unforeseeable."

The *Troidle* case was followed by *Buell* v. *Utica Gas & Electric Co.*, 259 N. Y. 443, in which the Court of Appeals unanimously affirmed the judgment of the Appellate Division dismissing the complaint. Here, wires carrying 44,000 volts were strung diagonally over a spur railroad track at a height of 29 feet. A contractor stationed a moveable

crane with a 40-foot boom at or near the point where the overhead wires were directly above the spur track. The crane was used to unload material from box cars. All parties realized that if, as the boom swung near the wire, the wires were touched, somebody might be killed. The electric company had had full notice and had examined the place. The contractor knew the danger and had cautioned its men. Buell knew the danger and had signalled the boom to stop three feet from the wire. The Court of Appeals took what may be characterized as a commonsense and practical approach to the factual situation and stated its conclusions (p. 448):

> "* * * Under these circumstances, with knowledge upon the part of every one, where rested the duty to avoid the danger? To us it seems apparent that it rested upon the contractor. This contractor selected the place and the site to do the work; it was a dangerous place; the contractor should have made it safe by either moving the cars beyond the crossing, shifting its plant, or else by arrangement with the electric company to lift its wires. This the company could easily have done; it was done the day after Buell's death, by erecting higher poles. This took but a few hours. * * *"

The contractor would not wait, but went on with the work.

> "As the wires (and this is the point) were reasonably safe for all usual and customary use of the siding or spur track, and were out of reach of any apparent danger—apparent from ordinary use—the company was not bound to move its wires because of some extraordinary, special and temporary use being made of the crossing by a contractor. * * * The contractor should have waited until the wires were raised, or have arranged to pay for the change, and not have proceeded in the face of such tremendous danger."

The cases cited by the United States Court of Appeals in its decision do not apply to the facts in this case.

POINT III

There was error in remanding the case for a new trial on the issues of the third-party complaint.

It has been pointed out under Point II that there was no duty on Central to insulate or de-energize its wires. The United States Court of Appeals in its opinion relating to the duties between the petitioner and third-party defendant again challenges the Trial Court's instruction that the petitioner's negligence could not be considered because of failure to insulate or de-energize (8a, 10a). It is submitted that the Trial Court was correct in charging the law as it did.

The cases of *Troidle* v. *Adirondack P. & L. Corp.* and *Buell* v. *Utica Gas & Electric Co., supra,* are authority for not only the principle of law as to the plaintiff, but also as to the third-party defendant. In its decision, the United States Court of Appeals was in error, it is respectfully submitted, in attaching negligence to the petitioner, even in part, upon the failure either to insulate or de-energize.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

GARVEY & CONWAY,
Attorneys for Petitioner.

GEORGE A. GARVEY,
On the Brief.

APPENDIX.

Opinion.

(1718)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 137. October Term, 1954.

Argued February 8, 1955. Decided July 6, 1955.

Docket No. 23286.

ALBERT BANKS,

Plaintiff-Appellee,

v.

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Defendant-Appellant and
Plaintiff-Appellee,

v.

NINNIE BROTHERS,

Third-Party Defendant-Appellant.

Before CLARK, Chief Judge, HINCKS, Circuit Judge, and SMITH, District Judge.

Appeal from a judgment entered on a verdict of a jury, after trial before Clancy, District Judge, for a recovery by the plaintiff from Central Hudson Gas & Electric Corporation, defendant, and on a special finding of the jury for recovery over by Central on its third-party complaint against Ninnie Brothers. Affirmed as to the recovery by the plaintiff from the defendant: reversed and remanded as to the recovery over against Ninnie Brothers.

MELVIN SACKS, New York, N. Y. (Benjamin H. Siff, of counsel), for Plaintiff-Appellee.

GARVEY & CONWAY, New York, N. Y. (George A. Conway, of counsel), for Defendant-Appellant and Third-Party Plaintiff-Appellee.

FREDERICK MELLOR, New York, N. Y. (Joseph F. Hanley, of counsel), for Third-Party Defendant-Appellant.

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HINCKS, Circuit Judge:

Alfred Banks sustained severe injuries by electric shock when the boom of a crane came in contact with overhead wires carrying high voltage electric current. Banks sought recovery against the owner of the wires, Central Hudson Gas & Electric Corporation (hereinafter called "Central"). Central impleaded Ninnie Brothers (hereinafter called "Ninnie"), Banks' employer and the owner of the crane. In the third-party complaint Central alleged that it is entitled to indemnity from Ninnie in the event that Central is held liable to Banks. Federal jurisdiction was based on diversity of citizenship and amount in controversy.

The action was tried to a jury which returned a verdict of $85,000 in Banks' favor. On the third-party complaint, the jury, finding that Central was only "passively" negligent, awarded it recovery over against Ninnie, who, as it was found, was "actively" negligent.

From the judgment entered on the jury verdict, both Central and Ninnie bring this appeal. Both appellants claim that Banks was contributorily negligent and Central contends that the finding of negligence on its part was contrary to the weight of the evidence. Ninnie contends

that its motion made at the close of the evidence to dismiss the third-party complaint was erroneously denied. Ninnie also complains of the trial judge's charge to the jury and of his admission of a certain document in evidence.

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The facts of this case are as follows: Ninnie entered into a contract with the Atlas Company to construct a building on the west side of South Avenue, Beacon, New York. Banks, at the time of his injury, was working for Ninnie on the South Avenue project.

Central learned of the project nine months before it was commenced. Long before the accident it knew that the building was to be located on the west side of South Avenue and that heavy machinery, including a 40-foot crane, would be utilized in connection therewith. In view of this information Central decided to move its wires from the west side of South Avenue to its east side. Throughout the process of construction, Central's overhead electric wires, carrying 13,800 volts, were located on the east side of the street some 50 to 60 feet distant from the building under construction. The wires were strung on poles 40 feet above the street. As such they were 20 feet above the minimum height as required by regulations. The wires were uninsulated and there was evidence establishing that, although proper insulation would have prevented the injury in this case, industrial practice and government regulations did not require the insulation of wires maintained, as these were here, high above the ground. The wires were not de-energized to accommodate Ninnie although Central maintained switches at various points along its line so that the power could be turned off in appropriate circumstances. If this had been done a village of 1000 inhabitants, including a hospital, would have been deprived of elec-

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tricity. If the wires had been de-energized, of course, this accident would not have occurred.

Central never warned Ninnie that the wires were uninsulated and carried high voltage electric current. It failed to post warning signs in the vicinity of the construction site. Prior to the accident, while engaged in a conversation with an officer of the Atlas Company, one of Central's engineers observed the close proximity of Ninnie's crane to the overhead wires and mentioned the likelihood of injury if the boom of the crane passed too near the wires. But Central never directly communicated this warning to Ninnie or its employees working on the project.

Ninnie had been collecting quantities of metal blocks for use in the construction project. These were ordinarily kept on the west side of the street, but a day or so before the accident, Ninnie moved a few of them to a location on the east side of the street under Central's wires. Banks was in contact with one of the few blocks so situated when he was injured. The injury occurred when the boom of Ninnie's crane came in contact with Central's wires: the current of electricity passed from the boom down the cable of the crane to the metal block which was attached to the crane. The presence of the block on the east side of the street occasioned the swinging of the crane near the overhead wires. Although, as already noted, Central had known that a 40-foot crane would be in use on the project, all the testimony was that it had never known that the

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metal blocks had been placed on the east side of the street under its wires.

There was evidence establishing that it was Ninnie's constant practice to maintain a signal man to direct the

workers' attention to the movements of the crane. It is undisputed that Banks was not warned of the crane's movement on the occasion of his accident.

Both Ninnie and Central contend that on the evidence Banks was contributorily negligent as a matter of law. In view of Banks' testimony that (1) he had no knowledge that these particular wires were dangerous in any way, and (2) that, while engrossed in his work, he was relying on a signalman for directions (which were never given) as to the movement of the crane, we think the issue of his contributory negligence was for the jury. *Braun* v. *Buffalo General Electric Co.*, 200 N. Y. 484, 94 N. E. 206; *Underhill* v. *Major*, 220 App. Div. 173, aff'd 247 N. Y. 525; *Ward* v. *Clark*, 232 N. Y. 195; *Nicholson* v. *Greeley Square Hotel Company*, 227 N. Y. 345. The jury resolved this issue, as on the conflicting testimony it could properly have done, against the appellants.

The evidence clearly indicates that to facilitate the construction Central moved its wires across the street and maintained them at a height twice that required by regulations. It argues that under the law this was the full measure of its duty, and, having discharged that duty, there was no basis on which the jury could find that it was

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negligent. But Central fails to appreciate the extent of its legal obligation to a person in the situation of plaintiff. The trial judge charged the jury that Central could be held negligent if it breached its duty to warn the plaintiff and his fellow employees of the hazard of injury inherent in the overhead wires. Central protests that this was erroneous, contending that it had no duty to give warnings in the absence of notice that metal blocks were being

stored under its wires. This contention is untenable.[1] *Ward* v. *New York State Electric & Gas Corporation,* 290 N. Y. 325, 49 N. E. 2d 159; *Bennett* v. *New York & Queens Electric Light & Power Company,* 294 N. Y. 334, 62 N. E. 2d 219; *Pike* v. *Consolidated Edison Co.,* 303 N. Y. 1, 99 N. E. 2d 885. The thrust of these decisions is such that Central's knowledge that construction was under way which involved the use of a crane gave rise to a duty on its part to take reasonable precautions to prevent harm from its wires. And a jury might have found that the posting of warning signs was at least a part of that duty. *McFall* v. *Compagnie Maritime Belge,* 304 N. Y. 314, 107 N. E. 2d 463.

Central argues that its position on this point is sustained by *Troidle* v. *Adirondack Power and Light Corp.,* 252 N. Y. 483, and *Buell* v. *Utica Gas & Electric Co.,* 259 N. Y. 443. But under the *Ward, Bennett* and *Pike* decisions, *supra,* the doctrine of the cases cited by Central has no applicability to the facts of the instant case. Moreover,

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it is to be noted that in the *Buell* case the Court carefully pointed out that the victim, his employer and the defendant had notice of the dangerous instrumentality.

We think that Central was under a duty to warn the plaintiff. The record is replete with evidence sustaining the jury verdict that Central breached this duty and that its failure was a proximate cause of plaintiff's harm. Hence Central could properly be held liable for the injuries sustained by the plaintiff.

We now come to the question of the validity of the jury verdict granting Central recovery over against Ninnie.

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[1] Both parties concede that the law of New York is applicable in this case.

There was no express contract of indemnity: Central's claim for indemnity is based on common law tort principles. It has long been the law of New York that "* * * even in the absence of an express covenant of indemnity a primary or principal wrongdoer is responsible for his negligent act not only to the person directly injured, but also to one indirectly harmed by being cast in damages by operation of law for the wrongful act". *Tipaldi* v. *Riverside Memorial Chapel,* 273 App. Div. 414, 78 N. Y. S. 2d 12. See also *Dunn* v. *Uvalde Asphalt Paving Co.,* 175 N. Y. 214, 67 N. E. 439; *Scott* v. *Curtis,* 195 N. Y. 424, 88 N. E. 794. Thus, if Central proved that its negligence was only "passive" and that Ninnie was the primary wrongdoer in bringing about Banks' harm, the New York law would imply a contract of indemnity running from Ninnie to Central. See *Schwartz* v. *Merola Brothers Construction Corp.,* 290 N. Y. 145, 48 N. E. 2nd 299; *Phoenix*

Bridge Co. v. *Creem,* 102 App. Div. 354, 92 N. Y. S. 855, aff'd 185 N. Y. 580, 78 N. E. 1110. *Oceanic Steam Navigation Co.* v. *Compania Transatlantic Espanola,* 134 N. Y. 461, 31 N. E. 987.

This doctrine is often referred to as "active" and "passive" negligence. A tort-feasor whose negligence is only "passive" can recover from a co-tort-feasor if the latter is guilty of "active" negligence. To say that an act of omission is generally regarded as passive negligence only, while an act of commission is regarded as active negligence, may be useful dichotomy. But however useful the formula may be as a clue, under the law of New York it is not the sole criterion. It is the function of the jury to determine whether both defendants were guilty of negligence contributory to the harm: if so, to determine

whether they were equally at fault, in which event no right of indemnity arises. If, however, the jury finds that the fault of the third-party plaintiff was passive only and that the fault of the impleaded defendant was the primary cause of the harm, the latter will be held to indemnify the former in an action over. *McFall* v. *Compagnie Maritime Belge, supra.*

At the close of the evidence in the instant case Ninnie moved to dismiss the third-party complaint on the ground that at most it was in *pari delicto* with Central. We think, however, that the trial judge properly denied this motion. Especially in view of the evidence that Ninnie placed the metal blocks under Central's wires, that it was the

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proximity of Ninnie's crane to the wires, and that it was Ninnie's signalman who failed to signal, it was for the jury, under the cases cited above, to determine whether Ninnie's was the primary negligence.

The trial judge instructed the jury that it could not consider Central's failure to insulate or de-energize as evidence of negligence. It was made clear to the jury that Central's negligence could only be predicated on a finding that it breached its duty to warn the plaintiff. Ninnie contends that this instruction was error. The contention is important because of the impact of this instruction on the comparative negligence of the two actors.

Under the New York law, an electric company is not made an insurer against injury. Nevertheless, as was said of high voltage electricity in *Morhart* v. *Richmond Light and Railroad Co.*, 111 A. D. 353, 98 N. Y. S. 124, "This was a deadly force, and it was defendant's duty to exercise a high degree of care to protect the deceased from this current". In *Ferrari* v. *N. Y. Central & Hudson R. R. Co.*, 224 App. Div. 182, 230 N. Y. S. 60, it was stated that

wires carrying high voltage electricity must be "maintained and operated with reasonable care; reasonable care is a relative term, varying with circumstances and surroundings; here only a very attentive oversight of the dangerous instrumentality used by it in its business would meet the measure of its duty". There are many New York cases in which the evidence was such that it was held that the failure to insulate, even when regulations do not

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require insulation, or the failure to remove wires or to de-energize, may constitute a breach of this duty and hence were questions for the trier of the facts. *Braun* v. *Buffalo General Electric Co., supra; Burrows* v. *Livingston Niagara Power Co.,* 217 App. Div. 206, 216 N. Y. S. 516; *Casualty Co.* v. *A. L. Swett Electric Light & Power Co.,* 230 N. Y. 199, 129 N. E. 653; *Ward* v. *N. Y. State Elec. & Gas Corp, supra; Bennett* v. *N. Y. Queens Elec. Light & Power Co., supra; Pike* v. *Consolidated Edison Co., supra.*

In *Nicholas* v. *New York State Electric & Gas Corp.,* 127 N. Y. S. 2d 490, 283 App. Div. 490, a case decided by a divided court and affirmed also by a divided court without opinion in ... N. Y. ... (April 21, 1955) it appeared that the plaintiff had been injured by electric shock while painting the inside of an electric company sub-station. In setting aside a plaintiff's verdict the Court in effect ruled as a matter of law that the failure of the company to de-energize the electric conductors involved in the accident was a fact not in itself enough to constitute negligence. It is true that the opinion of the Appellate Division contained no ruling, express or implied, that considerations of reasonable care will never require a utility engaged in distributing electricity to the public to de-energize. At most it suggested that the duty of the utility to serve the consuming public is one factor bearing on its duty to safe-

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guard from harm other members of the public. The opinion stressed the fact that the plaintiff, a professional steel painter with experience in painting in proximity to live wires, admitted that he had been warned of, and thoroughly understood, the hazard under which he was working. Implicit is the view that effective warnings of the danger of live wires may mitigate the need to de-energize them. With this in mind, we think the reversal imports not that the numerous cases cited above have been overruled but only that the weight of evidence in that particular case had been insufficient to sustain the jury's finding of negligence.

Against this background of New York law, we come to the question whether in the state of the record in this case it was erroneous for the trial judge wholly to exclude Central's failure to de-energize from the consideration of the jury. As to this, we think that, forthwith when put on notice that Ninnie's crane had moved into the scene, no duty to de-energize arose if less drastic measures, not involving a suspension of its obligation to serve the consuming public, were available which might reasonably have been expected to be attrocious to protect the public from harm. The law of New York does not require that on notice of construction in the vicinity of its power lines a public utility has a duty to shut off power to the public until all possibility of harm that could result from the interaction between construction operations and its wires

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has ceased. Neither the cases cited above nor any others that we have found go to such a length: the *Nicholas* case contains at least an intimation to the contrary.

Here, however irrespective of the efficacy of suitable warnings as possibly obviating the need for further precautions, the verdict necessarily imports a finding that such warnings were not given. As noted above it cannot be said that finding was without adequate support in the evidence. From Central's failure in the discharge of its duty to warn, it does not follow that it was absolved from taking other available precautions. Thus the jury was confronted with questions as to Central's duty to take other, additional, precautions, including possibly de-energization, and for the solution of such questions was in vital need of appropriate instructions.

Although, as we hold, on this point the charge as given was erroneous and incomplete, the error does not taint the plaintiff's verdict against Central. For as noted above there was evidence sufficient to sustain the finding of negligence by Central. But as against Ninnie we think that the inaccuracy and insufficiency of the charge for the impact on the issues raised by the third-party complaint constituted reversible error. For if the jury had been instructed, as we think it should have been that failure by Central to take one precaution did not necessarily absolve it from taking other available precautions, including de-energizing, it might have found that Cen-

tral's aggregate fault, compounded of the failure to warn and failure to take other reasonable precautions, as compared with Ninnie's fault compounded of all proved negligent acts of omission and commission, was more than passive. Of course, the jury in making such a determination should concern itself only with such acts of negligence as it should find to constitute proximate causes of the accident. Instructions to that effect were also necessary.

Appendix.

What has been said above about a possible duty to de-energize applies equally to a possible duty to insulate. If warnings alone were inadequate precautionary measures, or if Central failed to warn, it was for the jury to determine under suitable instructions whether under all the circumstances Central's failure to insulate comported with the high degree of care required of it.

On a new trial of the issues under the third-party complaint, questions relating to the admissibility of a certain document now pressed by Ninnie will probably become moot. However, for whatever guidance it may be to the judge presiding at the new trial we will say that we think Judge Clancy was right in admitting it for purposes of impeachment only.

Judgment in favor of the plaintiff affirmed: judgment in favor of Central reversed and remanded for a new trial on all issues raised by the third-party complaint.

Appendix.

Judgment

(573)

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of July one thousand nine hundred and fifty-five.

Present:

Hon. CHARLES E. CLARK,
Chief Judge,

HON. CARROLL C. HINCKS,
Circuit Judge,

HON. J. JOSEPH SMITH,
District Judge.

ALBERT BANKS,
Plaintiff-Appellee,

v.

CENTRAL HUDSON GAS & ELECTRIC CORP.
Defendant-Appellant & Plaintiff-Appellee

v.

NINNIE BROS.
Third Party-Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court in favor of the plaintiff be and it hereby is affirmed: judgment in favor of Central Hudson Gas and Electric Corp. as against Ninnie Bros. be and it hereby is reversed and action remanded for a new trial on all issues raised by the third-party complaint in accordance with the opinion of this court with costs to the defendant Ninnie Bros.

A. DANIEL FUSARO,
Clerk.

Decision on Petition for Rehearing

(579)

Petition for rehearing denied,
(Judge Smith concurring.)

C.E.C.
C.C.H.
U.S.C.JJ.

New Haven, Conn.
August 23, 1955.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Filed: Aug 24, 1955
A. DANIEL FUSARO, CLERK

Appendix.

Order Denying Rehearing

(580)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 24th day of August, one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

Hon. CARROLL C. HINCKS,
Circuit Judge,

HON. J. JOSEPH SMITH,
District Judge.

ALBERT BANKS,
Plaintiff-Appellee,

v.

CENTRAL HUDSON GAS & ELECTRIC CORP.,
Defendant-Appellant,
Plaintiff-Appellee,

v.

NINNIE BROTHERS,
Third Party Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

OCT 28 1955
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 475

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

against

ALBERT BANKS,
Respondent.

and

NINNIE BROTHERS,
Third-Party Defendant-
Respondent.

BRIEF FOR RESPONDENT, ALBERT BANKS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinion Below.

The District Court rendered no opinion. The opinion of the Court of Appeals, Second Circuit, is reported at 224 F. 2d 631.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

Whether the Court of Appeals for the Second Circuit in affirming a judgment in plaintiff's favor in a personal injury action obtained in the United States District Court, Southern District, correctly applied the law of New York to the facts where it was conceded that the New York Law was applicable.

Statement.

Petitioner, Central Hudson Gas & Electric Corporation maintained uninsulated high tension wires carrying 13,800 volts over a public highway in the City of Beacon.

Plaintiff, a steel worker employed by the third-party defendant-respondent, Ninnie Brothers, in the erection of a building adjoining the highway was shocked and severely injured while at work on the public highway when a crane and a forty-five foot long beam operated by plaintiff's fellow employee came into contact with these wires.

The cause of action was predicated on the law of New York, as decided by the New York Court of Appeals in *Pike* v. *Consolidated Edison*, 303 N. Y. 1 (July 1951), and kindred cases, that the owner of high tension wires over a public highway was bound to ascertain the time when the work of erecting a contemplated structure near the highway would begin so as to take steps to protect workmen against the dangers that were hidden in such wires and that he could be cast on damages for failure to take adequate steps to avoid injury to such workmen.

The record establishes, and the Court of Appeals below so held, that the petitioner, Central Hudson Gas & Electric Corporation had a thoroughly documented as well as actual

knowledge of the fact that construction work was going on in close proximity to its wires (Plaintiff's Exhibits 3, 4, 5, 6, 7, 13, 16 (87, 88, 1226-1229, 1300, 1565-1566, 1607, 1616-1617).

The record further establishes that despite this knowledge, Central Hudson Gas & Electric Corporation did nothing whatever to protect the workmen who it was to be expected would be in the vicinity. It posted no signs or warnings of any kind that the wires it maintained over a public highway were high tension wires (1149). This omission was made in the face of rules of the U. S. Department of Commerce that called for such cautions and signs (1148-1149). It was conceded by petitioner's engineers that such safeguards were practicable (1149) and that such signs were in petitioner's possession (1149, 1249). In addition, it was established that although the engineers were well aware of the possibility of accident by way of contact between the crane here involved and petitioner's wires, none did anything to ameliorate the expectable dangers (1168, 1177, 1182, 1202, 1209-1210, 1359).

During the course of the construction work the respondent, Banks, while at work in the highway, was shocked by the high voltage electricity in the petitioner's wires when a boom of a crane operated by another came into contact with them.

POINT ONE.

The United States Court of Appeals correctly applied the pertinent New York law.

The Trial Court limited the issue of negligence to a failure to warn. It told the jury that it was not to consider the possibility of deenergization or insulation as relevant

to petitioner's care under the circumstances. This was an undue limitation of the obligation owed by the petitioner in the maintenance of high tension wires over a public highway. *Pike* v. *Consolidated Edison Company of New York,* 303 N. Y. 1.

However, the issue is irrelevant to plaintiff's position since there is ample evidence that the respondent failed to give any warnings of the nature of its wires as was its duty under New York law. *Pike* v. *Consolidated Edison,* 303 N. Y. 1; *Carlock* v. *Westchester Lighting Company,* 268 N. Y. 345; *Braun* v. *Buffalo General Electric Co.,* 200 N. Y. 484; *Casualty Company* v. *A. L. Swett Electric Light & Power Company,* 230 N. Y. 199; *Chatfield* v. *New York State Gas & Electric Corporation,* 269 App. Div. 896; *Ward* v. *N. Y. State Gas & Electric,* 290 N. Y. 325; *Zuppa* v. *Central Gas & Electric Corporation,* 302 N. Y. 287.

The two cases cited by the petitioner, *Troidle* v. *Adirondack P. & L. Corp.,* 252 N. Y. 483 and *Buell* v. *Utica Gas & Electric Company,* 259 N. Y. 443, were not only decided long before *Pike* v. *Consolidated Edison Company of New York,* 303 N. Y. 1, but are also wholly distinguishable on the facts. In those cases the high tension wires were maintained over *private property,* a vastly different situation from that presented here where the high tension wires were maintained over a *public highway.*

We submit, therefore, that the petition lacks substantial ground because it turns upon the particular facts involved.

Sufficiency of evidence does not ordinarily induce granting of a writ. *N. Y. Cent. R. R.* v. *Kinney,* 260 U. S. 340, 346 (1922). 'Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.' *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178 (1938). See McElwain, 'The Supreme Court's Business Under Hughes,' 63 Harv. L. Rev. 5, 13, n. 14 (1949).

'The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *' *Huddleston* v. *Dwyer,* 322 U. S. 232, 237 (1944).

POINT TWO.

The United States Court of Appeals correctly ruled as to the significance of the possibility of deenergization or insulation as a measure of care.

As the Court of Appeals pointed out, the question of deenergization or insulation does not taint plaintiff's judgment.

Plaintiff, having obtained a verdict despite the trial court's excluding from the jury's consideration the possibility of deenergization or insulation, and the finding being supported by the record and approved by the United States Court of Appeals, it is clear that whatever the merits of the argument with respect to deenergization or insulation may be, they do not affect plaintiff. In any event, we submit that the Circuit Court ruled properly on that phase of the case under the New York authorities heretofore cited.

This was a negligence case, properly decided in all its aspects under well established New York Law, and presents nothing for review.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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New York City, N. Y.

BENJAMIN H. SIFF,
Of Counsel.

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 475

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

against

ALBERT BANKS,
Respondent,

and

NINNIE BROTHERS,
Third-Party Defendant-Respondent.

BRIEF FOR RESPONDENT, NINNIE BROTHERS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK MELLOR,
Attorney for Third-Party
Defendant-Respondent,
Ninnie Brothers,
60 John Street,
New York, N. Y.

JOSEPH F. HANLEY,
Of Counsel,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioner,

against

ALBERT BANKS,

Respondent,

and

NINNIE BROTHERS,

Third-Party, Defendant-Respondent.

OFFICIAL OPINION IN CIRCUIT COURT OF APPEALS

The United States District Court rendered no opinion. The opinion of the Court of Appeals, Second Circuit, is reported at 224 F. 2d 631.

Jurisdiction

The jurisdictional question is not raised by petitioner, and it appears that the plaintiff was a resident of the State of New Jersey. The petitioner is a New York corporation and Ninnie Brothers are residents of New York State.

Questions Presented

The petitioner alleges that the United States Circuit Court of Appeals erred in improperly applying the law of the State of New York. It was conceded upon the trial that the New York law was applicable. The action is based upon negligence in which the plaintiff recovered a judgment which is affirmed in the Court of Appeals, Second Circuit.

Statement

Petitioner, Central Hudson Gas & Electric Corporation maintained uninsulated high tension wires carrying 13,800 volts over a public highway in the City of Beacon, State of New York.

Plaintiff, a steel worker employed by the third-party defendant-respondent, Ninnie Brothers, in the erection of a building adjoining the highway was shocked and injured while at work on a public highway when a crane and a forty-five foot beam operated by plaintiff's fellow employee came in contact with the wires aforementioned.

The cause of action was predicated on the law of New York, as decided by the New York Court of Appeals in *Pike* v. *Consolidated Edison,* 303 N. Y. 1 (July 1951), and kindred cases, holding in effect that the owner of high tension wires over a public highway was bound to ascertain the time when the work of erecting a contemplated structure near the highway would begin so as to take steps to protect workmen against the dangers that were hidden in such wires, and it further held that he could be cast on damages for failure to take adequate steps to avoid injury to such workmen.

The record establishes, and the Court of Appeals below held, that the petitioner, Central Hudson Gas & Electric Corporation, had a thoroughly documented as well as actual knowledge of the fact that construction work was

going on in close proximity to its wires and its engineers had full knowledge of the danger to same (Plaintiff's Exhibits 3, 4, 5, 6, 7, 13, 16 (folio pages 87, 88, 1226-1229, 1300, 1565-1566, 1607, 1616-1617)). See the record for these page numbers.

It further appears from the record that the Central Gas & Electric Corporation did nothing whatsoever to protect the workmen when they had full knowledge of the dangers present. They had knowledge that this work was going on and yet did nothing at all to protect these men. The Central Hudson posted no signs or warnings of any kind that the wires it maintained over a public highway were high tension wires (1149). The Regulations and Rules of the U. S. Department of Commerce called for such cautions and signs to be erected (1148-1149). The engineers called as witnesses in this case and employed by the Central Hudson Company conceded that such safeguards were practicable (1149); they further testified that the Central Hudson had signs in petitioner's possession at the time (1149, 1249). It further appeared from the evidence in the case that while the engineers were fully aware of the possibility of an accident by way of contact between the crane here involved and the petitioner's wires, they did nothing whatsoever to ameliorate the expectable dangers which were foreseeable and which they themselves predicted (1168, 1177, 1182, 1202, 1209-1210, 1359). While at work on the highway, the plaintiff was shocked by the high voltage electricity in the petitioner's wires when a boom of a crane operated by another came in contact with those wires.

POINT ONE

The United States Court of Appeals, Second Circuit, correctly applied the pertinent New York law.

The Trial Court, in its charge to the jury and throughout the case, limited the issue of negligence to a failure to warn. It emphasized to the jury that it was not to

consider the possibility of deenergization or insulation as relevant to petitioner's care under the circumstances. This was an undue limitation of the obligation owed by Central Hudson in the maintenance of high tension wires over a public highway as evidenced by the decisions of New York State. *Pike* v. *Consolidated Edison Company of New York,* 303 N. Y. 1.

However, Central Hudson failed to give any warnings of the nature of its wires as was its duty under New York law. *Pike* v. *Consolidated Edison,* 303 N. Y. 1; *Carlock* v. *Westchester Lighting Company,* 268 N. Y. 345; *Braun* v. *Buffalo General Electric Co.,* 200 N. Y. 484; *Casualty Company* v. *A. L. Swett Electric Light & Power Company,* 230 N. Y. 199; *Chatfield* v. *New York State Gas & Electric Corporation,* 269 App. Div. 896; *Ward* v. *N. Y. State Gas & Electric,* 290 N. Y. 325; *Zuppa* v. *Central Gas & Electric Corporation,* 302 N. Y. 287.

The two cases cited by the petitioner, Central Hudson Company, *Troidle* v. *Adirondack P. & L. Corp.,* 252 N. Y. 483 and *Buell* v. *Utica Gas & Electric Company,* 259 N. Y. 443, were decided a long time prior to the *Pike* case, *Pike* v. *Consolidated Edison Company of New York,* 303 N. Y. 1; these two cases relied upon by the petitioner are wholly distinguishable on the facts. It will be noted in those two cases the high tension wires were maintained over private property, a vastly different situation from the instant case, at bar, where this operation took place on the *public highway* in the City of Beacon, State of New York. It is conceded and the evidence distinctly shows that the wires involved in this case were over a public highway, which eliminates, from consideration, the *Troidle* case and the *Buell* case as authorities for the contention of the petitioner.

We therefore submit that the petition of the Central Hudson Company should be denied. It has been held that sufficiency of evidence does not ordinarily induce the grant-

ing of a writ. *N. Y. Central R. R.* v. *Kinney,* 260 U. S. 340, 346 (1922). "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178 (1938). See McElwain, "The Supreme Court's Business Under Hughes," 63 Harv. L. Rev. 5, 13, n. 14 (1949).

"The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *." *Huddleston* v. *Dwyer,* 322 U. S. 232, 237 (1944).

POINT TWO

The United States Court of Appeals correctly applied the law with reference to deenergization or insulation as a measure of care.

The Trial Court removed, from the consideration of the jury the question of deenergization or insulation. The Court of Appeals, however, stated that these two elements were to be considered with respect to the duty the petitioner owed other people rightfully upon the premises where these high tension wires were located. We submit that the Court of Appeals properly applied the New York law as applied to this case.

POINT THREE

The Court of Appeals committed no error in remanding the case for a new trial on the issues of the third-party complaint.

The United States Court of Appeals in its opinion was proper in applying the New York State law with respect to the question of deenergizing and also the question of

the failure of the petitioner to insulate (8a and 10a). We submit respectfully that the opinion of Judge Clark was full and complete with respect to this feature and was correct in applying the New York State law.

We submit respectfully that for the reasons hereinbefore stated the *Troidle* case and the *Buell* case are not in point, and are not applicable to the facts in the case at bar. What should have occurred in this case was that the sole proximate cause of this accident was the negligence of the petitioner herein and for that reason the complaint, with respect to the third-party defendant, Ninnie Brothers, should have been dismissed.

We submit respectfully that the United States Court of Appeals was not in error in rending and formulating its opinion upon the failure of the petitioner to insulate or to deenergize these high tension wires.

Conclusion

It is respectfully submitted that this Petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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